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No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOSEPH E. SIMON and
MARGARET E. SIMON,

Petitioner,

vs.

CITY OF LOS ANGELES,

Respondent.

On WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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88 pp

QUESTIONS PRESENTED

(1) Whether the harsh remedy of summary judgment may be imposed despite the raising of unquestionable triable issues of fact.

(2) Whether the two prong test set forth by this Court in the landmark case of Agins v. Tiburon (1980) 447 U.S. 225 requires a governmental agency to establish, as a matter of law, that the complained of land use regulation both substantially advanced a legitimate state interest and permitted the landowner to retain an economically viable use of his land before the issuance of an order granting summary judgment on a complaint for inverse condemnation.

(3) Whether damages are an appropriate remedy for inverse condemnation pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States.

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JOSEPH E. SIMON and
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Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioners Joseph E. Simon and Margaret E. Simon respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the case of Simon v. City of Los Angeles, 9th Cir. No. 83-6320.

OPINION BELOW

The memorandum opinion of the Court of Appeals is reproduced in Appendix A to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1985. (See Appendix A.) This Petition for Writ of Certiorari is filed within ninety days of that date. (28 U.S.C. Section 2101(c).) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(a).

STATUTORY OR CONSTITUTIONAL PROVISIONS INVOLVED

The principal Constitutional provisions are the Fifth and Fourteenth Amendments of the Constitution of the United States of America. Also addressed is the proper application of Federal Rules of Civil Procedure, Rule 56. These provisions are set out in pertinent part part in Appendix B hereto.

STATEMENT OF THE CASE

A. Factual Background

The underlying action in this case was instituted by a complaint filed July 7, 1982 in the United States District Court, Central District of California, alleging deprivation of property without due process of law and inverse condemnation.

Petitioners, Joseph E. Simon and Margaret E. Simon, are the owners of the real property which is the subject matter of this action, commonly described as 7920 Anise Avenue, Los Angeles, California. This property is located in the Westchester District of the City of Los Angeles.

Since Petitioners' purchase of the "subject property" in 1963, this property had been zoned as C2-1 commercial property until 1981, when the City of Los

Angeles (hereinafter "Respondent") caused the zoning of the subject property to change. This zoning change resulted in the underlying lawsuit. The Petitioners have owned the subject property for 21 years. For a number of years, the Petitioners used the subject property for the operation of a plumbing shop. There is a gas station on the lot adjacent to the subject property, a shopping center across the street, as well as a large multi-dwelling condominium complex in the vicinity. Petitioners are in their sixties. When Petitioner Joseph Simon retired from his plumbing business, the couple decided to sell the property and use the proceeds for their retirement.

In September, 1980, Petitioners entered into an escrow for sale of the subject property through a developer who intended to build a ten-unit condominium

structure thereon.

While the transaction was in escrow, Respondent downgraded the zoning of the Petitioners' lot from C2-1 Commercial, to RD2-1, Restricted Density Multiple Dwelling, while leaving all other property in the vicinity as previously zoned. No other properties in the area were affected by the zoning change, including the other multi-dwelling structure in the neighborhood. Due to the restrictive zone change by Respondent, Petitioners' buyer refused to complete the sale and the contract fell through. The zoning restriction has caused Petitioners to lose the substantial profits they would have realized upon sale of their property with C2-1 commercial zoning, and, Petitioners contend, deprives them of reasonable economic and viable use of their property.

B. Proceedings Below

1. Petitioners brought suit on July 7, 1982, in the United States District Court for the Central District of California against the City of Los Angeles, Respondent herein, alleging deprivation of property without due process of law and inverse condemnation.

2. On or about October 28, 1982, Respondent filed a Notice of Motion to Dismiss Complaint and Points and Authorities in Support Thereof. Said Motion sought dismissal against Petitioners and in favor of Respondent on the grounds that the allegations in the Complaint failed to meet the requirements enunciated in Agins v. Tiburon (1980) 447 U.S. 255 regarding inverse condemnation and that the Complaint failed to set forth any facts to support a claim of denial of due process.

3. The Respondent's Motion was heard on December 6, 1982, at which time the Motion to Dismiss was denied.

4. Respondent filed an Answer to Petitioners' Complaint on or about December 15, 1982.

5. A Motion for Summary Judgment was filed on or about March 14, 1983, on the basis that "there [was] no genuine issue as to any material facts" and that Respondent was entitled to Judgment as a matter of law. Respondent's Motion was heard on May 16, 1983, and was taken under submission at that time by the Honorable Richard A. Gadbois, Jr., Judge of the United States District Court, Central District.

6. On September 29, 1983, Judge Gadbois granted Respondent's Motion. [Order, filed September 29, 1983.]

7. An Appeal was taken to the

Ninth Circuit Court of Appeals, which held, in an unpublished memorandum opinion filed on February 6, 1985, that the rezoning ordinance did not effect a "taking" and that it was not facially unconstitutional nor did it deny Petitioners due process and equal protection (See Appendix A.)

8. The District Court had jurisdiction pursuant to 28 U.S.C. Section 1331. The Court of Appeals had jurisdiction of the appeal pursuant to 28 U.S.C. Section 1291.

RATIONALE FOR ALLOWANCE OF THE INSTANT WRIT

A. THE DECISION OF THE COURT OF APPEALS AFFIRMING THE DISTRICT COURT'S ORDER GRANTING SUMMARY JUDGMENT CONSTITUTES A SERIOUS DEPARTURE FROM THE ACCEPTED AND APPROPRIATE APPLICATION OF FEDERAL RULES OF CIVIL PROCEDURE, RULE 56.

1. Summary Judgment is a Harsh Remedy and Should Not Be Granted in a Case Which Presents Numerous Issues to be Decided by the Trier of Fact.

The District Court granted and the Court of Appeals affirmed an Order granting Respondent's Motion for Summary Judgment, despite the fact that there were and still are numerous material issues of fact which should have been reserved for decision by the trier of fact. Accordingly, the decision of the Court of Appeals affirming the District Court's Order granting summary judgment constituted a serious departure from

the accepted and appropriate application of Federal Rules of Civil Procedure, Rule 56.

The Federal Rules of Civil Procedure, Rule 56, provides that summary judgment may only be granted when:

> ". . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."
> (Emphasis added)

In Associated Press v. United States (1944) 326 U.S. 1, this Honorable Court stated:

> "We agree that Rule 56 should be cautiously invoked to the end that parties may always be afforded trial where there is a bona fide dispute of facts between them." 326 U.S. at 6-7.

In the present case, there are numerous bona fide issues of fact which can only be resolved by a trial on the merits. In light of the numerous disputed issues set forth hereinbelow, Respondent's Motion should have been denied and the Court of Appeals should have reversed the District Court's Order granting same and remanded for further proceedings.

As noted in United States v. Diebold, Inc., (1962) 369 U.S. 654 at 655:

> "On summary motion the inference to be drawn from the underlying facts contained in the moving parties' materials must be viewed in the light most favorable to the party opposing the motion."

Pursuant to Rule 56(e) of the Federal Rules of Civil Procedure, the existence of actual issues need not be shown conclusively in favor of the party asserting their existence. All that is

required is some evidence supporting the claimed factual dispute which would require a jury or judge to resolve the parties' differing versions of truth at trial. (First Nat. Bank v. Cities Service Co. (1968) 391 U.S. 253)

In the present case, both the District Court and Court of Appeals refused to hear evidence on various disputed facts. However, it was clear that Petitioners were prepared to offer substantial evidence in support of their contentions, and that the disputed issues were in fact genuine. Many of the disputed facts were referenced in the Findings of Fact and Conclusions of Law issued by the District Court and, sub silentio, affirmed by the Court of Appeals. The resolution of these disputed issues in favor of Respondent, and the resulting grant of summary judgment, deprived the Petitioners of the

opportunity to present their evidence before the jury.

As indicated by the Federal Rules and case law, summary judgment is a harsh remedy and should only be granted where there are clearly no triable issues of fact. Such was not the case in the Courts below where there existed numerous genuine issues of material fact. In such cases, pursuant to the correct application of Rule 56 of the Federal Rules of Civil Procedure, summary judgment should not be granted, and in the present case, the granting of same and affirmance thereof were clearly erroneous.

2. The Granting of Respondent's Motion for Summary Judgment Precluded the Introduction of Evidence Regarding Numerous Genuine Issues of Material Fact in Dispute, Which Should Have Been Resolved by a Trial on the Merits.

In its order granting summary

judgment, the District Court concluded that Petitioners had raised no genuine issues as to any material facts. Petitioners respectfully submit that numerous genuine issues of material fact exist, which were improperly decided by the trier of law in this case, without the benefit of a trial on the merits.

Specifically, the following genuine issues of material fact and contentions were erroneously determined, without evidence, by the District Court and, sub silentio, affirmed by the Court of Appeals:

(a) The Courts found that the subject property "was formerly zoned for and developed with a commercial use which has since been abandoned." [Findings, p. 2, l. 1-2.]

Contrary to the District Court's

finding, the commercial use had not been abandoned by the Petitioners. No evidence establishing this highly prejudicial conclusion was before either Court. In fact, the assertion that the commercial use had been abandoned was denied under oath by both the Petitioners. The facts clearly evidence that six months prior to the first hearing on the proposed zone change, the Petitioners had entered into an escrow for sale of the subject property through a developer who intended to build a 10-unit condominium structure thereon. No evidence was presented which could possibly have led the Courts to decide as they did that commercial use was truly abandoned. This issue was of critical importance as the Courts undoubtedly reasoned that if the use had been abandoned, its future prohibition would be of small consequence, and, thus, no

substantial taking would occur. To the contrary, in the instant case, the downzoning caused the immediate destruction of the escrow, and, ultimately, to this day, has prevented the Petitioners from using the property for the purpose they had intended. Thus, the finding of abandonment of commercial use was clearly erroneous, substantially prejudicial and contrary to established application of the Federal Rules of Civil Procedure, Rule 56.

(b) The District Court found that "Plaintiffs have not applied for a building permit for a specific proposed development . . ." [Findings, p. 4, l. 20-23.] In making this finding, the District Court presumably accepted, and the Appellate Court affirmed, Respondent's argument that the Petitioners

must attempt to "make due" with the downzoning.

By affirming the District Court's finding and reiterating same in its Memorandum Opinion, the Ninth Circuit Court of Appeals directly contradicted one of its former holdings set forth in the case of Martino v. Santa Clara Valley Water Dist. (1983) 703 F.2d 1141, 1146-47 where the Court stated:

> "The primary basis for rejecting the landowners' inverse condemnation claim was that the regulation "on its face" did not "deprive the landowner of substantially all reasonable use of his property," 24 Cal.3d at 277, 548 P.2d at 31, 157 Cal.Rptr. at 378, and did not "prevent the best use of appellants' land . . . [or] extinguish a fundamental attribute of ownership," 477 U.S. at 262, 100 S.Ct. at 2142. In other words, the landowners in Agins had shown an

> "invasion" of their property rights, contrary to the interpretation of the district court, but not an "invasion" of sufficient magnitude to have "denied [the landowners] the 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments." Id. at 262-63, 100 S.Ct. at 2142. We hold, therefore, that the failure to submit a development plan is not, in and of itself, a bar to an attack on the ordinance "on its face." Because the Martinos' facial attack raises material issues of fact as to whether the mere enactment of the ordinance "prevent[ed] the best use of appellants' land. . . [or] extinguish[ed] a fundamental attribute of ownership," id. at 262, 100 S.Ct. at 2142, we remand to the district court for a determination of those issues. (Emphasis added.)

The case before this Court raises even

more substantial and numerous genuine issues of material fact ignored by the Courts below and cries out for the instant Writ to issue for proper application of Federal Rule of Civil Procedure, Rule 56.

It is clear in the instant case that Petitioners alleged in their Complaint, and under oath, expressly and impliedly, that the downzoning of their property, by its mere enactment, prevented the best use of their land and extinguished a fundamental attribute of ownership.

Clearly, the Petitioners lost the benefit of an existing sale agreement. The buyers of the property did not desire to scale down their proposed use of the property; the downzoned property was useless for their purpose. The Petitioners did not wish to, nor could they afford to, undertake the task of building on the land themselves. Thus,

the fact that the Petitioners did not apply for a building permit after the property was downzoned is irrelevant, and should not have been considered by the Courts as a relevant factor in determining the summary judgment motion or granting and affirming same. In addition, the Petitioners were prepared, but precluded, and are prepared, to offer evidence that the subject property has continuously been on the market since the downzoning, and has not sold as a direct result of the unlawful taking by Respondent. Thus, the above finding was clearly erroneous, substantially prejudicial, contrary to established application of Federal Rules of Civil Procedure, Rule 56, and specifically in conflict with the decision set forth in Martino v. Santa Cla.. Valley Water Dist., supra.

(c) The District Court also found that the Westchester area was "without much vacant land for future development. As a result, there is very little development or zoning activity in the area." [Findings, p. 6, l. 11-14.]

Not only was there insufficient evidence for this finding by the District Court, impliedly adopted by the Court of Appeals, but the statement is simply not true. The Courts presumably decided that the Westchester area was a settled area, and that the Petitioners proposed use would disrupt the surrounding areas. In actuality, there is a significant degree of new building in the Westchester area, and Petitioners proposed use conformed with that spirit of progress and development. Petitioners were prepared to establish the development in the Westchester area, and again so declared

under oath. The Courts below were asked to take judicial notice of recent zoning changes involving approximately 25 acres of land within a proximity of less than 10 blocks of the subject property, recently sold by Hughes Corporation for a multi-unit housing development, offices and parking. That was only one example of many which the Petitioners offered to use if permitted their right to trial on the merits.

It is clear that the Courts below ignored the evidence of Petitioners, notwithstanding factual allegations under oath, and based upon their twenty year residence in the area. Since significant consistent growth was occuring near the property, the legitimacy of the downzoning was genuinely in issue.

In light of the foregoing numerous

genuine issues of material facts, the decision of the Court of Appeals affirming the District Court's Order granting summary judgment constituted a serious departure from the accepted and appropriate application of both the Federal Rules of Civil Procedure, Rule 56, and case law, justifying the intervention of this Court by the granting of the Writ sought herein.

The District Court also rendered Conclusions of Law. These Conclusions of Law were, sub silentio, affirmed by the Court of Appeals and, in addition thereto, in part expressly adopted in the Memorandum Decision of the Court of Appeals. The Conclusions of Law of the District Court, as well as the apparent Conclusions of Law set forth in the Memorandum Opinion of the Court of Appeals, both erroneously analyzed the evidence before said Courts

and, in addition thereto, the proper application of the two prong test set forth in the seminal landmark case of Agins v. Tiburon (1980) 447 U.S. 255.

The District Court found that the "change of zone advances the legitimate state interest of bringing zoning into conformity with planning and in good zoning practices." [Findings, p. 7, l. 23-p. 8, l. 8.]

The Court of Appeals found "Appellants' affidavits do not counter this clear showing of legitimate state interest."

Both these conclusions underpin the lower Courts' rulings and completely misconstrue and misapply the test set forth in Agins to justify a taking without compensation.

Petitioners' contention was that in

order for Respondent to escape liability for its taking, Agins v. Tiburon, supra, required nothing less than a showing that (1) The zoning ordinance substantially advances a legitimate state interest, and (2) that the owner is not denied an economically viable use of his land. 447 U.S. at 260-61.

Petitioners contended, and contend before this Honorable Court, that the zone change did not substantially advance a legitimate state interest. In order to support this contention, Petitioners demonstrated the nature of the neighborhood within which the zone change was effected and declared under oath that said neighborhood included a gas station adjoining the subject property, a large shopping center directly across the street from the subject property, a large condominium complex within the area of the

subject property, and other business properties. Petitioners' property alone was singled out for downzoning.

In addition to the foregoing, Petitioners declared under oath and cited numerous instances of other building developments in the locale. These facts demonstrate, and clearly raise the material question of fact, that far from advancing a substantial legitimate state interest, the zone change complained of represented arbritrary and unjustified conduct on the part of the City, and, thus, as discussed more fully hereinbelow, failed to meet the test set forth by this Court in Agins.

Both the District Court and the Court of Appeals misconstrued the first prong of the Agins test by expressly finding that all Respondent need prove is that a

legitimate state interest existed in order to justify the zone change. Clearly, this is not the mandate of Agins. While a city or other governmental unit may, in fact, enact ordinances in order to regulate the use and development of land, Agins requires that if those ordinances fail to advance a substantial legitimate state interest, those ordinances constitute a taking for which compensation must be given. The fact that both Courts merely found a legitimate state interest might, on its face, justify the existence of the ordinance, but, clearly, does not absolve the governmental unit from giving compensation therefor in accordance with the Fifth and Fourteenth Amendments of the Constitution of the United States of America and the mandates this Court enunciates in Agins.

In light of the foregoing, it is

respectfully submitted that both the District Court and Ninth Circuit Court of Appeals have decided an important question of federal law in conflict with the appropriate interpretation of the decision of this Honorable Court as set forth in Agins v. Tiburon, supra. The granting of the instant Writ of Certiorari gives this Honorable Court the opportunity to give direction to lower Federal Courts obviously misinterpreting previous rulings heretofore rendered.

The District Court further rendered a Conclusion of Law that the zone change challenged hereinbelow left the Petitioners with a "substantial and economically viable use of their property", citing Agins v. Tiburon, 447 U.S. 255 (1980). [Findings, p. 8, l. 9-13.]

The Court of Appeals affirmed the above-referenced Conclusion of Law, sub silentio, and expressly found similarly when it stated in its Memorandum Opinion that "while they may not be able to sell the land for the anticipated construction of a ten-unit structure, they may nevertheless construct a structure of up to six-units under the rezoning. Thus, a substantial economic use remains."

As noted more fully hereinbelow, the above-referenced Conclusion of Law was made despite the fact that the District Court allowed no evidence as to the value or use of the subject property subsequent to the zone change. The Court of Appeals had no evidence before it as to the practical economic viable use of the property for construction of a structure up to six-units or of any number of units whatsoever. Petitioners declared that the

property had been on the market since the downzoning and could not be sold and, further, set forth in their Brief before the Court of Appeals that there was no economically viable utilization of the property due to the downzoning thereof. Specifically, Petitioners contended that it was not economically viable to construct a six-unit condominium structure on the subject property.

In light of the foregoing, it is clear that a genuine question of material fact relating to the economic feasibility of use of the subject property subsequent to the downzoning was a matter to be heard by the jury after presentation of substantial evidence. It is respectfully submitted that it was clearly an abuse of discretion to grant summary judgment, or affirm the Order granting same, in lieu of a jury

being permitted to decide these critically important issues. Failure to permit evidence or to have evidence before it on the issue of economic use clearly prevented either the District Court or the Court of Appeals from finding, as a matter of law, that the Petitioners were not denied an economically viable use of their land. As such, it was impossible, per force, for the Courts below to establish the second prong of the two prong Agins test and, therefore, constituted a serious departure from the accepted and appropriate application of both the Federal Rules of Civil Procedure, Rule 56, and case law, justifying intervention of this Court by granting of the Writ sought herein.

B. THE DECISION OF THE COURT OF APPEALS AFFIRMING THE DISTRICT COURT'S ORDER GRANTING SUMMARY JUDGMENT REPRESENTS AN EROSION OF THE STANDARDS SET FORTH IN THE TWO-PRONG AGINS TEST TO DETERMINE A TAKING FOR CONSTITUTIONAL PURPOSES.

This Court has enunciated a two-prong test for courts to apply when an allegation of taking is asserted. It is critical to realize that the Respondent government, herein the City of Los Angeles, must establish that both prongs of the test have been met in order to absolve themselves from financial responsibility for their taking vis-a-vis the subject property. In Agins v. Tiburon (1980) 447 U.S. 255, 260-61, this Court held:

> "The application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an

> owner an economically viable use of his land. The determination that governmental action constitutes the taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests . . . (Emphasis added.)

Clearly, whenever a question of balancing arises with regard to private and public interests, questions of fact abound, and various factors must be taken into careful consideration. Such considerations are most appropriately left to the trier of fact, and only in the clearest of cases subject to summary adjudication.

Petitioners strenuously contended, and

now contend, that unlike Agins, the zoning change in the present case did not substantially advance some legitimate state interest, nor did it leave Petitioners with an economically viable use of their land.

Since neither prong of the Agins test was met in the Courts below, the granting of summary judgment was inappropriate and a misapplication of Agins mandate. Further, the analysis and purported application of the Agins test in an incorrect manner represents an erosion of the standards set forth by this Court to determine a taking for constitutional purposes.

1. The Downzoning of Petitioners' Property Did Not Substantially Advance a Legitimate State Interest as Required by the First Prong of the Agins Test.

In granting summary judgment, the

District Court underpinned its entire decision on Agins v. Tiberon (1980) 447 U.S. 225, (hereinafter "Agins"), and determined that there had been no "taking". The Court of Appeals affirmed, likewise relying exclusively on Agins. Both lower courts misapplied the test set forth in Agins requiring a showing that the downzoning substantially advanced a legitimate state interest in order to avoid compensation for an unlawful taking.

In Agins, the plaintiffs owned land described as "ridgelands which possess magnificent views of San Francisco Bay and the scenic surrounding areas." 447 U.S. at 258. The land in question was open space land and the city was required by State law to prepare a general plan of development, in order to preserve the beauty of the area. The resulting rezoning was pursuant to the plan which

affected the entire area, not just a particular plot of land or one particular property owner.

By contrast, the downzoning in the present case affected one plot of land, owned by a retired couple in their sixties. The subject property herein had been the site of a plumbing shop for almost two decades, and was the basis of a contract of sale to a developer who sought to build a ten-unit condominium complex thereon.

In order for the Courts below to justify their decisions permitting summary judgment, they had to determine, as a matter of law, that the downzoning of the subject property substantially advanced a legitimate state interest as required by the first prong of the Agins test.

For an ordinance to substantially advance a legitimate state interest, there

must be some showing made. This showing requires more than a bold face statement. In Agins, the ordinance substantially advanced a legitimate state interest in preserving "the ridgelands which possess magnificent views of San Francisco bay and the scenic surrounding areas." Other examples in which this Court has found that zoning laws substantially advanced a legitimate state interest are as follows: Penn Central Trans Co. v. New York City (1977) 438 U.S. 104, in which the Court was concerned with the preservation of an historical landmark: Village of Euclid v. Ambler Realty Co. (1926) 272 U.S. 365, in which the Court upheld the comprehensive zoning plan in which the Plaintiffs desired use was completely inappropriate; Hadacheck v. Sebastian (1915) 239 U.S. 394, Goldblatt v. Hempstead (1961) 369 U.S. 590, and Penna.

Coal Co. v. Mahone (1922) 260 U.S. 393, in which the Court was persuaded to prohibit certain dangerous uses of land which adversely affected the public welfare.

The case at bar presents no comparable interest which was advanced by the downzoning.

In the instant case, no comprehensive zoning action was taken. The Petitioners intended to sell the subject property for use as a multi-dwelling condominium complex which conformed to other structures in the neighborhood. One would think that this use would be more desirable than the plumbing shop which had been located on the subject property for almost twenty years. If the City Council felt that multi-dwelling structures were inappropriate for the neighborhood or commercial use was unwarranted, the zoning restriction should have been applied to

all properties equally, rather than restricted only to the Petitioners' property. The fact that the zoning ordinance was applied only to them belies any reasonable explanation for this arbitrary act or justification for lack of payment therefor.

The decisions of the Courts hereinbelow fail to consider the distinction between the right to make a zone change and the obligation to compensate for such change. Petitioners do not dispute the Respondent City's inherent right to make zoning changes. They question only the Respondent City's right to take an individuals property without just compensation.

In the case of Penna. Coal Co. v. Mahone (1922) 260 U.S. 393, this Court warned:

"We are in danger of

> forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." 260 U.S. at 416.

This Court's admonition is as potent now as it was over six decades ago. Where zoning is done in a piece-meal fashion, as here, the public interest argument should be viewed with suspicion. This Court in Penna. Coal Co., supra, also decided that:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. When this seemingly-absolute protection is found to be qualified by the police power, the natural tendency of

> human nature is to extend the qualifications more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> ' The general rule at least is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a "taking".'" 260 U.S. at 415.

It appears that the Courts below believed that the Respondent, having proclaimed through its declarant a legitimate state interest, had nothing further to discuss. This Court clearly intended a more rigorous standard, when it stated in Agins:

> "Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interest . . ."

447 U.S. at 260-261
(Emphasis added.)

"Public interest" cannot be used as an easy excuse for arbitrary or discriminatory restrictive zoning. The public interest must substantially outweigh the private interest, as, for example, where public health or safety is in danger, where historical landmarks are jeopardized, where scenic natural areas are threatened, or to prevent urbanization. Respondent claimed that the downzoning of the Petitioners' single lot would make the property more compatible with the surrounding area. This argument was adopted by the Court of Appeals in its Memorandum Opinion. The argument is ludicrous, as the gas station, the supermarket, and the other high-density buildings in the area were not similarly downzoned. If the Respondent City really

had it in mind to decrease traffic congestion, high density and commercial use, why did it rezone only Petitioners' property, leave all other parcels unaffected and recently permit development of approximately 25 acres of multi-unit residential and parking structures within less than 10 blocks of the subject property.

Petitioners' property was within the boundaries of the Westchester-Playa del Rey District Plan, which cites among its objectives:

> "To make provisions for housing of such types, sizes and density as are required to satisfy the varying needs and desires of all economic segments of the district while optimizing the opportunity for individual choice within the constraints composed by land availability, land and development costs, and

> population growth." [District Plan, page 1].

Petitioners alleged and desired to prove to a trier of fact that their intended use of the property was within this scope of usage as contemplated by the District Plan. They desired to produce evidence at trial that, considering all factors, their use was, in fact, more appropriate than the downzoned use permitted.

In a recent case, Kaiser Aetna v. United States, (1979) 444 U.S. 164, 174-75, this Court observed that historically, a Court:

> "has examined the 'taking' questions by engaging in essentially ad hoc, factual inquiries that have identified several factors -- such as the economic impact of the regulation, its interference with reasonable investment-

> backed expectations, and the character of the governmental action -- that have particular significance."

This Court's admonition in Kaiser, supra of engaging in factual inquiries into a panoply of areas where questions of taking arise were, it is respectfully submitted, completely disregarded and transgressed by the District Court's granting of Summary Judgment in the instant case and the Court of Appeals affirming thereof. Each area of factual inquiry discussed in Kaiser, supra exists herein and was effectively prevented from being explored by the orders from which this Writ derives.

In light of the foregoing, it is respectfully submitted that the lower Courts' analysis of the downzoning of Petitioners property could not, and did not, meet the requirements set forth in

the first-prong of the Agins test and establishment that the downzoning substantially advanced a legitimate state interest could not have been found as a matter of law.

2. The Downzoning of Petitioners' Property Did Not Permit an Economically Viable Use of Their Property as Required by the Second Prong of the Agins Test.

The lower Courts concluded, without any evidence in support thereof, that a substantial economic use remained subsequent to the downzoning of Petitioners' property. Petitioners submit that there is a qualitative difference between an "economically viable use" on the one hand and an "economic and viable use" on the other. A use may be viable, and it may also have a positive economic impact, but when viewed in the real world, may not be economically sound.

The Agins test does not compel an unhappy property owner to resort to a use that simply does not make sense economically.

In the present case, the use mandated by the downzoning is not economically viable. Prior to the downzoning, the real estate developer planned to build a ten-unit condominium complex on the subject property, each unit consisting of approximately 800 square feet. As a result of the downzoning, the average square footage per unit increases to 2,000 square feet. The Respondent admits that the development of land would be so restricted and assumes, without proof, that this restriction will cause no hardship. The important question is whether or not the construction of 2,000 square foot condominiums is an economically viable use in the geographic locale of the subject property. A

developer must balance the cost of building against the profitability of the units. Where, as here, he is limited in the number of units for sale, the profitability depends substantially on the cost per unit and the saleability of higher priced units. In the present case, the subject property is located in a geographic area in which the average unit is 800 square feet. The District Court and, sub silentio, the Court of Appeals refused to allow any evidence regarding the "economically viable use" of the property after the zone change. Petitioners submit that the geographic location of the subject property is such that the construction of six 2,000 square foot units is not economically viable. The construction of six 800 square foot units would obviously even further reduce the profit margin for the builder. The

very fact that the builder backed out of the contract immediately after the downzoning evidences the economic hardship caused by same.

Additionally, Petitioners have had the property on the market since the zone change, without locating any interested buyers. Respondent argues that Petitioners should simply develop the property themselves in the manner authorized by the zone change. In fact, Respondent places great emphasis on the fact that Petitioners have not sought a building permit. Petitioners are not real estate developers--they are instead a retired couple, planning to sell the property for support during their retirement. As a direct result of the downzoning, they have not been able to sell the property. Petitioners do not, and never did, have the resources with

which to develop this property themselves. Respondent proposes to test the "economically viable use" prong of Agins by requiring Petitioners themselves to raise the capital to develop the property in a way which is not even economically viable to a professional developer.

As stated by the Court of Appeals in Martino v. Santa Clara Valley Water District (1983) 703 F.2d 1141 (9th Cir.):

> "We hold, therefore, that the failure to submit a development plan is not, in and of itself, a bar to an attack on the ordinance 'on its face'. Because the Martino's facial attack raises material issues of fact as to whether the mere enactment of the ordinance 'prevent[ed] the best use of appellants' land . . . [or] extinguish[ed] a fundamental attribute of ownership' . . . we remand to the District Court for a

determination of those issues."
703 F.2d at 1146-1147.

Although Respondent claims that there is no evidence that Petitioners have lost an economically viable use of their land, a review of the facts suggests this a falsity. Immediately following, and as a direct result of the downzoning, Petitioners' buyer backed out of the existing real estate purchase agreement. Since then, Petitioners have been unable to sell the property. Finally, if permitted to do so, Petitioners would present evidence of the fact that the construction of six 2,000 square foot condominiums is not an economically viable use of the land. Thus, there has been a taking for which Petitioners must be compensated.

The lower courts failure to permit a trial on the merits regarding the

establishment of the second prong of the Agins test clearly ignores the mandates of Agins and the precedent of the Ninth Circuit as set out in Martino v. Santa Clara Valley Water Dist., supra. Such departure from established precedent clearly justifies the issuance of the instant Writ.

C. DAMAGES ARE AN APPROPRIATE REMEDY FOR INVERSE CONDEMNATION

The complaint filed in the underlying action sought damages as just compensation for the taking of Petitioners' property. Neither the District Court nor the Court of Appeals address this issue, based upon their erroneous conclusions that the down-zoning in question did not constitute a "taking". Petitioners respectfully submit that numerous questions of fact have been raised in this Writ, which, if permitted to be presented before the trier of fact, would lead to the conclusion that the aforementioned zoning change did in fact constitute a "taking", and, as such, Petitioners are entitled to compensation.

Respondent's brief before the Court of Appeals strenuously argued that California does not permit damages in a case of inverse condemnation, citing

Agins v. Tiburon (1980) 24 Cal.3d 266,276-77. Petitioner's Reply Brief before the Court of Appeals strenuously disagreed with the aforementioned position, particularly in light of the opinions set forth in San Diego Gas & Electric Co. v. City of San Diego (1981) 450 U.S. 621 and Martino vs. Santa Clara Valley Water District (9th Cir., 1983) 703 F. 2d 1141.

Since it is believed this Honorable Court should grant the instant Writ and thereafter reverse the decisions granting summary judgment, Petitioners believe that this case gives this Court an opportunity to also resolve the conflicting rulings of various Courts of Appeal relating to

damages as an appropriate remedy for inverse condemnation.*

In San Diego Gas & Electric Co., supra "Justice Brennan proposed a constitutional rule requiring that, once a Court finds that a regulation had resulted in a 'taking', the government entity must pay just compensation for the period commencing on the date the regulation first effected the "taking" and continuing until the entity chose to rescind or

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*The Court is advised that the question as to whether damages are an appropriate remedy for inverse condemnation is currently before this Court in the case of Williamson County Regional Planning Commission, et. al.,vs. Hamilton Bank of Johnson City (Case No. 84-4) orally argued February 19, 1985. Although said case may resolve the issue, such was also anticipated in San Diego Gas & Electric Company, supra, which case was decided on other grounds. As such, Petitioners include the instant discussion.

otherwise amend the regulation. Id at 658" See Martino, supra at 703 F. 2d 1148.

In San Diego Gas & Electric Co., supra, Justice Brennan spoke for four members of the Court, with Justice Rehnquist, although joining the majority on the jurisdictional point, fully supporting the substantive soundness of Justice Brennan's views. These views impliedly, if not expressly, set forth the substantive and remedial views of this Court's majority, particularly since the majority opinion in San Diego Gas & Electric Co., supra, merely addressed the jurisdictional issue, and did not disagree with the dissent's substantive views.

Numerous circuit Courts of Appeals, as well as various state Courts, have followed the views articulated in the aforementioned opinion of Justice Brennan.

See Hernandez vs. City of Lafayette, 643 F. 2d 1188 (1981, 5th Cir.), Devines vs. Maier, 665 F.2d 138, 142, (1981, 7th Cir.) Barbian vs. Panagis, 694 F.2d 476, 482, fn. 5 (1982, 7th Cir.), In re Aircrash in Bali, 684 F.2d 1301, 1311, fn. 7(1982, 9th Cir.), Martino vs. Santa Clara Valley Water Dist., 703 F.2d 1141, 1148 (1983, 9th Cir.), Fountain vs. Metro Atlanta Rapid Transit Dist., 678 F.2d 1038, 1043 (1982, 11th Cir.) and of course, the Court below: Hamilton Bank vs. Williamson County, etc., Comm'n., 729 F.2d 402, 408 (1984, 6th Cir.). To the same effect, Wheeler vs. City of Pleasant Grove, 664 F.2d 99 (1981, 5th Cir.), endorsing the 42 U.S.C. Section 1983 damages remedy for temporary denial of use of the subject property under a local confiscatory land use ordinance. Also see,

Gordon vs. City of Warren, 579 F.2d 386 (1978, 6th Cir.). Only the First Circuit adheres to the lonely and concededly problem-ridden position that non-monetary relief is the sole remedy: Pamel Corp. vs. Puerto Rico Highway Auth., 621 F.2d 33 (1980, 1st Cir.) Burrows vs. City of Keene, 432 A. 2d 15, (1981, N.H.); Zinn vs. State, 334 N.W. 2d 67, 72-73 (1983, Wis.); Rippley vs. City of Lincoln, 330 N.W. 2d 505, 511 (1983, N.D.); Pioneer Land & Gravel vs. Anchorage, 627 P. 2d 651 (1981, Alaska) (Reserving judgment on proper remedy in light of San Diego Gas & Electric, but in the meantime allowing the inverse condemnation action to proceed.)

In California, the Ninth Circuit Court of Appeals has recognized this Court's departure from the dicta in the California Supreme Court's decision of

Agins vs. Tiburon wherein the Court stated that a landowner could not recover damages for inverse condemnation. The Court in Martino supra, decided to join this Court's lead, and, thus, also chose not to follow the aforementioned dicta. The Martino Court noted that:

> "The present vitality of this aspect of Agins, has, however, been substantially undercut by Justice Brennan's dissenting opinion in San Diego Gas & Electric Co. vs. City of San Diego (1981) 450 U.S. 621, 636-641, in which Justices Stewart, Marshall and Powell joined. In reaching the merits of the case after a majority of the Court had voted to dismiss the appeal for lack of a final judgment, Justice Brennan stated: 'The only constitutional requirement is that the landowner must be able meaningfully to challenge a regulation that allegedly effects a "taking", and recover just compensation if it does so.' Id, at 660. Justice Brennan rejected the California

Supreme Court's justification of "various policy considerations" for its decision in Agins, stating that the applicability of constitutional guarantees does not hinge on legislative policy judgments, nor should the vindication of these guarantees depend upon the expense in doing so. Accordingly, Justice Brennan proposed a constitutional rule requiring that, once a court finds that a regulation had resulted in a "taking", the government entity must pay just compensation for the period commencing on the date the regulation first effected the "taking" and continuing until the entity chose to rescind or otherwise amend the regulation. Id, at 658." 703 F.2d at 1148.

The Court concluded in Martino:

"Thus, a majority of the Court apparently is of the opinion -- contrary to that of the California Supreme Court in Agins -- that damages are recoverable for inverse condemnation." 703 F.2d at 1148.

In conclusion, it is clear that the San Diego Gas & Electric Co. analysis is eminently just and fair, and has had far reaching impact in its persuasive appeal to Courts around the country notwithstanding its lack of precedentially compulsive effect. It is time that this Court take advantage of the opportunity presented to it by the subject Writ, and adopt the aforementioned analysis as the Court's holding.

CONCLUSION

Because the aforementioned issues are of such importance and because the manner in which the Court of Appeals has treated them threatens a serious erosion of principles carefully enunciated by this Court, it is respectfully urged that a

Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

FILED
FEBRUARY 6, 1985

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH E. SIMON and MARGARET E. SIMON,	NO. 83-6320
Plaintiffs-Appellants,	D.C. NO. C-82-3338-RG
vs.	MEMORANDUM
CITY OF LOS ANGELES,	
Defendant-Appellee.	

Appeal from the United States District Court for the Central District of California
Richard A. Gadbois, District Judge, Presiding
Argued and Submitted
December 3, 1984

Before: CHAMBERS and PREGERSON, Circuit Judges, and REED*, District Judge

*The Honorable Edward C. Reed, Jr., United States District Judge for the District of Nevada, sitting by designation.

In November 1980, the Los Angeles City Council voted to change the zoning of a parcel of land owned by the Simons, located in the Westchester-Playa del Rey Planning District of the City, from C@-1 (commercial use) to RD2-1 (low-medium density multiple residential use). Public hearings were conducted before a hearing officer on behalf of the City Planning Commission and he concluded that the rezoning complied with the District Plan. He recommended the rezoning and the City Planning Commission later accepted his recommendations. The Planning and Environment Committee of the City Council then held public hearings and it too recommended the rezoning. On October 14, 1981, the City Council held public hearings and it too then voted unanimously in favor of the RD2-1 rezoning.

Appellants' action in district court

charged and unlawful taking of their property without just compensation in violation of the Fifth Amendment and a denial of due process and equal protection in violation of the Fourteenth Amendment. The City moved for summary judgment and submitted affidavit evidence of the hearing examiner who had conducted the hearings for the City Planning Commission. His affidavit recited that a plumbing shop had operated on the parcel but that use had been Abandoned and the premises were in a deteriorated condition. He stated that there had been convincing evidence from neighbors that high density use would generate increased parking and traffic congestion and that they strongly urged that the parcel be zoned to provide a buffer zone between the gas station on the south and the private single family dwellings to the north. He recited that

he had concluded from the evidence produced at the haring and from his own inspection of the premises that, given the location and size of the parcel, construction within RD2-1 zoning would be appropriate. Under this zoning the owners would be permitted to construct a six-unit project. He considered other zoning alternatives and concluded that RD2-1 most clearly fit the District Plan and more clearly satisfied general zoning practice.

The appellants countered with their own affidavits stating that they had entered into an escrow to sell the property to a buyer who intended to constuct a ten-unit condominium structure on the property. When the land was rezoned he withdrew from the escrow. They had earlier planned to construct an eighteen-unit structure on their parcel. They alleged a lack of opportunity to

prepare for the first hearing and they offered their opinions that low-medium density recommendations were "absurd" and not conceived to improve the character of the neighborhood. They concluded that the zone change was politically inspired and was arbitrary and irrational. They also submitted an affidavit of a law student who compiled statistics to indicate that during the period in question, of 364 zone change applications, 331 were approved and 33 were disapproved.

We review the district court's summary judgment in favor of the city de novo. National Union Fire Ins. Co. v. Argonaut Ins. Co., 701 F.2d 95, 96 (9th Cir. 1983). The inquiry is to determine if there is any genuine issue of material fact that precluded such judgment. Rule 56(c), F.R. Civ. P.

We note, at the outset, that as in

Agins v. Tiburon, 477 U.S. 255 (1980), the property owners in this case never submitted a plan for the development of the parcel as the ordinance requires. Therefore, there is as yet "no concrete controversy regarding the application of the specific zoning provisions. "Agins, id. at 260 (emphasis supplied). Thus, here, as in Agins, we may simply ask whether the mere enactment of the zoning ordinance constituted a taking. Under the Rule of Agins, there is a "taking" for constitutional purposes only if 1) the zoning ordinance does not substantially advance legitimtate state interests, or 2) it denies the owner economically viable use of his land. Agins, id.

Zoning ordinances are presumptively valid, given the broad power of lacal governments to zone and control land use. Lydo Enterpriese, Inc. v. City of Las

Vegas, 745 F.2d 1211 (9th Cir. 1984). The ordinance in this case, unlike the ordinance in Agins, is addressed to a single parcel of land. Keeping this distinction in mind, we nevertheless conclude, on the basis of the record before us, that summary judgment was proper. Affidavit evidence presented by the city indicates that the area is in a state of transition and that the parcel in question is in a unique position to afford a buffer zone between commercial use (i.e. the gas station) on the south, and residential use (i.e. the family residence) on the north. At the various public hearings such a buffer zone was determined to be consistent with the District Plan and consistent with general zoning practice. The rezoning ordinance takes into account neighborhood interest (also reflected in the District Plan) for

guarding against increased parking and traffic congestion. Appellants' affidavits do not counter this clear showing of legitimate State interest. Summary judgment was proper as to the first prong of the Agins test.

Moreover, the record repudiates any claim that the ordinance on its face denied the owners economically feasible use of their land and thus effected a "taking" on the second prong of the Agins test. While they may not be able to sell the land for the anticipated construction of a ten-unit structure, they may nevertheless construct a structure of up to six units under the rezoning. Thus, a substantial economic use remains.

Appellants' complaint also charges a denial of their rights to due process and equal protection, under the 14th Amendment, largely because they were not

given the full 28-day statutory notice of the first hearing before the hearing officer. The record demonstrates, however, that they were present and were heard. Thereafter, at the various other public hearings that were held they were also present and they were also heard. Their unsupported suspicions that the rezoning ordinance is "an arbitrary and irrational attack prompted by political motives" is conclusionary at best.

We conclude that the rezoning ordinance did not effect a "taking" and that it is not facially unconstitutional. We also conclude that summary judgment was appropriate on appellants' claim of a

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denial of due process and equal protection.

Affirmed.

The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for the disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

APPENDIX B

U.S. CONST. Amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rules of Civil Procedure,

Rule 56. Summary Judgment

(a) For claimant

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at

anytime after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be

rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and

what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without subtantial controvery, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies

of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present

by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

(g) Affidavits made in bad faith

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.